Herbert F. Darling, Inc. *and* **Robert T. Ewing.** Case 3-CA-10565

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 20 May 1982 Administrative Law Judge Martin L. Linsky issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

I. THE ADMINISTRATIVE LAW JUDGE'S FINDINGS

Respondent is a general contractor engaged in installing piles, sewer systems, and related services. In 1980,[1] Respondent was doing construction work on the rapid transit system being built in Buffalo, New York. In March, Charging Party Robert T. Ewing was referred to one of Respondent's rapid transit jobs[2] by William Burke, business agent for Piledrivers, Dock Builders, Trestle, Crib Breakwater Builders, Local 1978, AFL-CIO (the Union). Respondent routinely obtained piledrivers like Ewing through the referral hall operated by the Union.

Ewing worked from March until December on a crew which included Foreman Hoffman, union steward Higgins, P. Smith, and R. Smith. On 3 December, at the conclusion of a phase of work on Job No. 602, this crew was laid off, except for Foreman Hoffman.[3] Respondent's superintendent, Farrell, informed the crew of the layoff, and stated that there would be more work in approximately a month.[4]

During October, while Ewing was working for Respondent on Job No. 602, Respondent's rapid transit worksite was visited by inspectors from the Occupational Health and Safety Administration (OSHA). The inspection was of a general, routine nature, and was not based on any complaints.

In early 1981, not having been recalled, Ewing called Burke and explained that he (Ewing) was going to visit Respondent's jobsite. Ewing went to the rapid transit site and spoke with Richard Radel, Respondent's project manager. Radel indicated that there would be a need for more workers in the near future. However, a few weeks later, when Ewing had not yet been recalled, Ewing telephoned Burke. Burke then informed Ewing that he had heard that Ewing would not be rehired by Respondent because Ewing had made a complaint to OSHA concerning Respondent. Ewing then telephoned Roy Shafer, Respondent's vice president for construction, and confronted him with what Burke had said. The Administrative Law Judge credited Ewing and found that Shafer replied that Respondent indeed did not want Ewing to work for Respondent because Respondent believed Ewing had reported the Company to OSHA. Ewing denied the accusation.

Ewing next contacted an attorney concerning the issue of his return to work. Ewing also visited the local OSHA office, and was informed that no one using his name had made a complaint about Respondent to OSHA. Subsequently, in March 1981, Ewing, accompanied by Burke, met with Shafer. Ewing again denied making an OSHA complaint, and, according to the Administrative Law Judge's credibility resolution, Shafer answered that Respondent had narrowed it down to three persons who it believed had reported Respondent to OSHA; that Ewing was one of those three; and that Respondent did not want Ewing working for Respondent again.

Thereafter, Ewing's attorney obtained a letter from OSHA indicating that Ewing had not filed a complaint. Ewing was then advised that he would be recalled to work in April 1981. Respondent recalled Ewing on 27 April 1981. He was again laid off on 4 May 1981. Thereafter, in 1981, he worked in the following time periods: 7-23 May; 9 June; and 24-29 June. By comparison, the members of the crew on which Ewing had been working were recalled on 19 December.[5]

Based on the foregoing and particularly his crediting of Ewing and Burke and his discrediting of Shafer, the Administrative Law Judge found that Respondent had failed to recall Ewing from the

[1] All dates hereinafter are in 1980 unless otherwise noted.

[2] The record indicates this job was called "Job No. 602."

[3] The General Counsel does not contend that this layoff violated the Act.

[4] Ewing testified that Farrell stated, "It would be about a month before we were called back . . . maybe a little more." Farrell testified that he told the crew that "the next phase was starting in about a month." The Administrative Law Judge concluded that Ewing was not specifically *promised* that he would be recalled, but the *implication* of the conversation was that Ewing would be brought back in about a month.

[5] These employees also worked continuously in 1981.

December layoff because of its mistaken belief that Ewing had filed a complaint about Respondent with OSHA.[6] Having concluded that a single employee engages in protected activity when he files a safety complaint with OSHA, the Administrative Law Judge found that, *a fortiori*, it was a violation of the Act for an employer to discriminate against an employee who it *believed* had filed such a complaint. Hence, the Administrative Law Judge concluded that Respondent had discriminated against Ewing in violation of Section 8(a)(1) of the Act by refusing to recall him and then by recalling him intermittently because it mistakenly thought he had filed an OSHA complaint.

II. ANALYSIS OF THE CASE

In proving a case of discrimination under the Act, it is the General Counsel's burden to show by a preponderance of the relevant evidence that a respondent acted in derogation of employee rights protected by the Act.[7] The record as a whole, including the weight of the evidence, the inherent probabilities, and the reasonable inferences to be drawn therefrom, must be assessed in reaching the result in a case. Moreover, where an administrative law judge's credibility resolutions are not based on demeanor analyses, the Board is as fully capable of analyzing the record as the administrative law judge.[8] Further, to the extent that credibility resolutions are based on demeanor, that factor is significantly diminished where the clear preponderance of the evidence convinces us such resolutions are incorrect.[9] With these considerations in mind, we find below that the General Counsel has failed to prove by a preponderance of the relevant evidence that Respondent discriminated against the Charging Party in violation of the Act.

Foremost in our consideration of this case is the undisputed fact that the 23 October OSHA inspection of Respondent's rapid transit construction project was a general, routine inspection, and that Respondent knew it to be such. Radel's uncontradicted testimony indicates that he asked the OSHA inspectors at the time of the investigation whether there had been a specific safety complaint.[10] He was informed that there had been no specific complaints, and that the inspection was routine. Radel was told that the adjacent contractor had been inspected the week before, and it then was Respondent's turn to be inspected.[11] Further, the record contains no evidence of any employees complaining to OSHA about safety problems at Respondent's jobsites.

We thus agree with Respondent that, in this factual context, there is no reason to find, or even to suspect, that Respondent was concerned with the OSHA incident. Knowing that the inspection was of a general nature, Respondent would not have been interested in purportedly discovering who may have reported it to OSHA, because it was a matter of record that there was *no* complaint which triggered the inspection and, critically, the inspection was not the kind that was triggered by a complaint. Therefore, even if there were a rumor that Ewing or some other employees had lodged a complaint with OSHA, and assuming that Respondent was aware of that rumor, it would not appear to have been a cause of concern for Respondent,[12] for there simply was no action by OSHA to support such a rumor.

The facts relating to Respondent's recall practices also do not lend support to the General Counsel's case or the Administrative Law Judge's analysis. The General Counsel argued, and the Administrative Law Judge appeared to have found, that Respondent's recall on 19 December of all members of Ewing's crew except for Ewing demonstrated Respondent's discriminatory treatment of Ewing. The same claim is made with respect to Ewing's subsequent intermittent work history with Respondent in 1981. However, the record does not support either of these arguments.

In assessing the facts regarding the recall of Ewing's crew, the Administrative Law Judge overlooked an important fact. The record indicates that Respondent usually employed two types of employees. The first class of employees were called "regulars," or "steady Eddies." These employees were usually welders who performed at an above average level, and who were capable of being foremen. Respondent's practice was to request regulars by name from the Union. Those regulars on layoff were usually the first to be recalled. The other class of employees were nonregulars, who were not normally requested by name. Instead, Respondent typically informed the Union, i.e., Burke, of its employment needs, and Burke selected the nonregular piledrivers to be referred. Ewing was a non-

[6] The Administrative Law Judge also found that when Respondent finally used Ewing in 1981 it did so only for short periods of time because of the same unfounded belief as described above, and because Ewing had complained of his treatment and had obtained counsel to help him.

[7] See, e.g., *Wright Line*, 251 NLRB 1083, 1088, fn. 11 (1980).

[8] *J. N. Ceazan Co.*, 246 NLRB 637, 638, fn. 6 (1979).

[9] *W. T. Grant Co.*, 214 NLRB 698 (1974).

[10] Radel testified that, if a specific complaint were involved, the inspectors could go only to the complaint area, instead of touring the entire worksite.

[11] Shafer corroborated Radel's testimony in significant respects. In addition, the letter secured by Ewing's attorney from OSHA confirmed that all inspections of Respondent "were initiated as general scheduled inspections . . . ."

[12] In these circumstances, it is irrelevant that, as a result of the inspection and a followup inspection, Respondent was cited for three safety violations and fined $300 for one of them.

regular employee, and therefore typically he would not have been requested by name by Respondent to work for it. In fact, he typically would be referred by Burke upon a general call from Respondent for piledrivers. Moreover, the record indicates that, although initial crews on a work project had preference for recall to that project, piledrivers later added to the crew did not enjoy that preference. Ewing was not an initial member of his crew on Job No. 602 and therefore enjoyed no preference for recall. Further, Burke stated that there was no seniority provisions as such in the contract; there also were no seniority practices at Respondent's operations.

Thus, the fact that the other members of the crew on which Ewing worked had been recalled by Respondent in December 1980 is of little, if any, probative value. Regarding Ewing's crew, we note that Foreman Hoffman was never laid off, but was placed on another job, as was Respondent's practice with foremen. Higgins, according to testimony, was entitled, by virtue of his status as a union steward, to be placed on the job by Burke regardless of Respondent's preference or request. Both P. Smith and R. Smith were regulars who ordinarily would be requested by name to work for Respondent, and who would be the first to be recalled. Thus, that Ewing may have had a longer work history with Respondent[13] than Higgins or R. Smith is of no moment since he was not a regular or otherwise entitled to a special recall.[14] In sum, Ewing was not entitled to be recalled as a piledriver on Respondent's rapid transit project, and thus his lack of recall to the job is not, by itself, proof of discrimination.[15]

Ewing's work history with Respondent likewise does not support the conclusion that his 1981 series of layoffs and recall evinced a pattern of discrimination. Ewing first joined the Union in 1967, and was referred to Respondent by Burke in the summer of 1967. From 1968-72, Ewing worked on a seasonal basis with Respondent. He did not work at all for Respondent in 1972, 1973, or 1977. In 1975 and 1976, Ewing worked more regularly, but, in 1978, he worked only during 3 months. In 1979, Ewing was employed by Respondent for only 2 months. As indicated above, Ewing worked substantially for Respondent during 9 months of 1980. Again, in 1981, Ewing was employed for only parts of a few months. But, based on his prior work history, this latter work pattern clearly does not indicate, of itself, that Ewing's recall pattern in 1981 was evidence of any discrimination toward him.

Based on the foregoing considerations, we cannot conclude that the General Counsel has proven by a preponderance of the evidence that Respondent discriminated against Ewing because it believed that Ewing had filed an OSHA complaint. The circumstances surrounding the OSHA inspection and the evidence of Respondent's general hiring practices and Ewing's particular work history do not support the inference that Respondent discriminated against Ewing, particularly since he was a nonregular who was not entitled to recall.

Notwithstanding the Administrative Law Judge's reference at the outset of his Decision to the demeanor of the witnesses, it is clear from the Decision itself that the Administrative Law Judge's credibility resolutions are not based specifically on demeanor, but rather are premised on an analysis of the facts and the logical inferences to be drawn therefrom, and we are therefore as able to decide issues of credibility as he. As indicated, we cannot agree with his analysis of the facts, and thus we cannot accept his credibility resolutions. We therefore find, contrary to the Administrative Law Judge, that Respondent, through Shafer, did not tell Ewing that it would not recall him because it believed he had complained to OSHA, and we further conclude that Respondent did not violate the Act by failing to recall Ewing or by employing him intermittently in 1981. Accordingly, we shall dismiss the complaint in its entirety.[16]

[13] See discussion, *infra.*

[14] Conversely, we note that Burke indicated that he was *never* told by Respondent *not* to refer Ewing in January or February 1981. Thus, given the fact that Respondent also would not have asked for Ewing by name, the failure to refer him and his failure to work for Respondent in that time period are clearly not imputable to Respondent even under the General Counsel's facts.

[15] Both the Administrative Law Judge and the General Counsel view as significant the fact that Respondent hired "permit men" while Ewing was on layoff. We attach no significance to this fact. Permit men were carpenters who were permitted to work as piledrivers when there were no union piledrivers available. The record establishes that permit men once hired could not be laid off to make positions available for "regulars" or nonregular employees employed by Respondent. Furthermore, permit men were usually referred by the Union. Thus, the fact that some permit men may have been referred or recalled despite the fact that Ewing was available for recall demonstrates only that, for one reason or another, established procedures may have been ignored; it does not, without more, demonstrate discrimination against Ewing.

In focusing on the issue of the permit men our dissenting colleague, like the Administrative Law Judge, overlooks the record as a whole with respect to recalls at Respondent's work project. For the fact remains that there was nothing unlawful concerning the recall of other members of the crew on which Ewing worked, and there was nothing unlawful about the use of permit men at the project. Simply stated, neither set of circumstances lends support to a theory of discrimination against Ewing.

[16] In agreeing that the 8(a)(1) allegations should be dismissed Chairman Dotson and Member Hunter find it unnecessary to reach the legal issue of whether Respondent would have violated the Act had it curtailed Ewing's work opportunities because it thought that he had filed a complaint with OSHA.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER ZIMMERMAN, dissenting:

This case presents the issue of whether Respondent violated Section 8(a)(1) of the Act by not recalling employee Ewing from layoff because it believed that he made a complaint to OSHA. On the basis of the credited testimony of witnesses and other circumstantial evidence, the Administrative Law Judge concluded that Respondent so violated the Act. My colleagues in the majority refuse to accept the credibility resolutions of the Administrative Law Judge and dismiss the complaint on the weakest evidentiary grounds. I cannot agree and would adopt the Administrative Law Judge's Decision.

Discriminatee Ewing and Union Business Manager Burke testified that Respondent's vice president, Shafer, stated over the telephone to Ewing and in person to both Ewing and Burke that Ewing was not being recalled because Respondent believed that he made a complaint to OSHA. Vice President Shafer denied making such statements. The Administrative Law Judge credited the testimony of Ewing and Burke. In addition to the demeanor of the witnesses, he pointed to Respondent's recall of Ewing's entire crew 5 months prior to Ewing's recall and to Respondent's failure to recall Ewing before it became aware of a written statement by OSHA, secured by Ewing's attorney, that Ewing had filed no complaint against Respondent. On these grounds the Administrative Law Judge found a violation of Section 8(a)(1) of the Act. It is obvious that credibility is the central issue in this case.

As my colleagues in the majority concede, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Further, the Supreme Court has firmly established the deference due to an administrative law judge's findings, particularly with respect to credibility. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), the Court stated:

> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. *We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he had reached the same conclusion.* The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. *The significance of his report of course, depends largely on the importance of credibility in the particular case.* [Emphasis supplied.]

My colleagues in the majority would ignore the Administrative Law Judge's crediting of the mutually corroborative testimony of two witnesses, supported by circumstantial evidence. Instead they speculate that Respondent would not have been interested in determining who may have complained to OSHA because Respondent knew that the OSHA inspection conducted at its premises was not the type that was triggered by a complaint. The only other evidence the majority relies upon is Ewing's status as a nonregular employee, not entitled to recall as were permanent employees. Yet, in response to the evidence cited by the Administrative Law Judge that permit men (carpenters allowed to work as piledrivers when no union piledrivers were available) were hired when Ewing was on layoff, my colleagues can only say, "the fact that some permit men may have been referred or recalled despite the fact that Ewing was available for recall demonstrates only that, for one reason or another, established procedures may have been ignored . . . ."

Relying on speculation of this sort is flouting the time-honored role of the administrative law judge. Since I would honor that role, I dissent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge: This case was tried before me on January 25 and 26, 1982, in Buffalo, New York. The complaint in this matter was issued by the Regional Director for Region 3 on September 9, 1981, based on a charge filed on July 21, 1981, by Robert T. Ewing. The complaint alleges that Herbert F. Darling, Inc., herein Respondent, violated Section 8(a)(1) of the National Labor Relations Act, herein the Act, when it failed to recall Robert T. Ewing from layoff and otherwise discriminated against him because it believed that he had made a complaint concerning Respondent to an agency of the U.S. Government; namely, the Occupational Safety and Health Administration, herein OSHA.

Respondent denied in its answer that it committed any unfair labor practice.

Upon consideration of the entire record, to include posthearing briefs filed by the General Counsel and Respondent, and upon my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

At all times material herein, Respondent has maintained its principal office and place of business at 131 California Drive, in the city of Williamsville, and State of New York, herein called the Williamsville facility, and various other construction jobsites in western New York, and is and has been at all times material herein engaged at said facilities and locations in the construction industry as a general contractor engaged in installing piles, sewer systems, and related services.

Annually, Respondent, in the course and conduct of its nonretail business operations, receives gross revenues in excess of $50,000. During the same period of time, Respondent receives goods and materials at its New York jobsites valued in excess of $50,000, which goods and materials were shipped directly from States other than the State of New York.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Piledrivers, Dock Builders, Trestle, Crib Breakwater Builders, Local 1978, AFL-CIO, herein Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

The complaint alleges that Robert T. Ewing, the charging party, was not recalled from layoff and was otherwise discriminated against by Respondent by being recalled for brief periods of time only because Respondent believed that Ewing had made a complaint about Respondent to OSHA.

Robert T. Ewing, whose testimony I credit, is a young piledriver. He has been a member of Local 1978 since 1967 and has worked for Respondent off and on over the years. The manner in which piledrivers such as Ewing are hired by Respondent is as follows: When a need for piledrivers arise Respondent, by one of its agents, will call William Burke, the business manager for Local 1978, and request the requisite number of piledrivers, either by name or simply state the number of piledrivers needed. Evidence at the hearing established that if specifically requested piledrivers were available for work they would be sent out otherwise Burke would send out the number of piledrivers requested. In March 1980, Ewing was referred to Respondent and began work on a job that Respondent was engaged in; namely, a section of work on the rapid transit system in Buffalo. On December 3, 1980, after working steady for Respondent for 9 months Ewing was laid off. At time of the layoff Ewing was a member of a five-member crew consisting of Foreman Mert Hoffman, steward James Higgins, Parke Smith, Robin Smith, and Ewing. Ron Farrell, job superintendent for Respondent, was the man who told Ewing he was being laid off. Farrell advised Ewing that there would be more work in about a month or a little more. While Ewing was not specifically promised that he would be brought back in about a month the clear implication was that he would be recalled by Respondent in approximately that time. When he was not recalled after approximately 1 month Ewing called Burke, the business manager for Local 1978, and told him that he (Ewing) was going out to Respondent's jobsite and see about going back to work. Burke said fine. Ewing went to the rapid transit jobsite and saw Richard Radel, project manager for Respondent. Ewing asked Radel when he (Ewing) could be expected to be recalled to work. Radel told Ewing that Respondent would be needing more men in a week or two. Three weeks later, when Ewing had heard nothing furher, he called Burke who advised him that Respondent did not want Ewing to work for it anymore because he (Ewing) had written a letter to OSHA complaining about Respondent. Ewing denied that he had done any such thing and, within a few minutes of completing his conversation with Burke, Ewing called Respondent and spoke with Roy Shafer, vice president of Respondent Company. Shafer confirmed that Respondent did not want Ewing back because it believed he had reported the Company to OSHA. Ewing denied to Shafer that he had done so. Ewing then contacted James Kogler, an attorney in private practice and told him his problem.

Thinking that possibly someone else had used his name without his permission in making a complaint to OSHA, Ewing, accompanied by his father, went to OSHA's Buffalo office and was advised that no one using his name had made a complaint to OSHA. Ewing then called Business Manager Burke and made arrangements to meet with Burke at Respondent's office to straighten the matter out with Vice President Shafer. Shafer, Burke, and Ewing met. Ewing again denied to Shafer that he had made a complaint to OSHA. Shafer told Burke and Ewing that Respondent had narrowed it down to three men who they believed reported the Company to OSHA, one of them was Ewing, and it did not want Ewing working for them. Burke left the meeting and Ewing remained behind with Shafer. He inquired of Shafer if possibly there were some complaints the Company might have about Ewing's workmanship. At this point Project Manager Radel entered the office and Shafer told Radel to tell Ewing what he thought of Ewing's work. Radel told Ewing that he was a good worker.

Following this meeting Ewing again contacted his attorney, James Kogler. Kogler thereafter wrote a letter to Herbert F. Darling, Jr., president of Respondent Company. Darling turned the letter over to Frederick D. Turner, an attorney who represented Respondent on corporate matters. Following conversations between Kogler and Turner, Kogler secured a letter from OSHA confirming that Ewing had not filed a complaint with that agency.[1] Turner wrote to Kogler and advised him that

[1] In one of their conversations Turner advised Kogler that he believed there was a problem with Ewing's work. At the hearing it was stipulated by the parties that the quality of Ewing's work was not at issue in this case; i.e., he was a good worker.

Ewing would be recalled to work during the week of April 27, 1981. Ewing returned to work on April 27, 1981, but was laid off again on May 4, 1981. He was again recalled on May 7, 1981, but was laid off on May 22, 1981. He was recalled a third time on June 9, 1981, but was laid off at the end of the day. He was recalled a fourth time on June 24, 1981, but was laid off on June 29, 1981. Ewing filed a charge with the National Labor Relations Board on July 21, 1981. Ewing remained out of work until recalled by Respondent in December 1981 and with one very brief layoff had worked steady for Respondent up to the commencement of the hearing in this matter. It is unknown if Ewing is still working for Respondent at the present time or not.

On October 23, 1980, a little more than 1 month before Ewing was laid off on December 3, 1980, OSHA conducted a general inspection at Respondent's rapid transit jobsite. The inspection was a general, routine inspection and was not prompted by the receipt of any complaint by OSHA.

When Ewing was laid off on December 3, 1980, his entire crew with the exception of Foreman Mert Hoffman was also laid off. Although Ewing was not recalled until April 27, 1981, the rest of the crew that was laid off had all been recalled by December 19, 1980. Evidence at the hearing showed that if piledrivers were needed but all Local 1978 piledrivers were unavailable for one reason or another, e.g., already employed or ill, then members of the Carpenters union would be permitted to do the work of piledrivers These men were called "permit men." After Ewing's layoff and prior to his first recall on April 27, 1981, "permit men" were hired by Respondent. During the long hiatus between the end of June 1980 when Ewing was laid off and December 1980 when Ewing was recalled for good no less than 28 of the 82 piledrivers who worked for Respondent in 1981 had been recalled ahead of Ewing.[2]

It is clear from this record that Ewing was not recalled from layoff because Respondent believed (albeit inaccurately) that he had complained about it to OSHA. Evidence that establishes that Ewing was discriminated against as a result of this mistaken belief on Respondent's part is reflected by the fact that Ewing's entire crew was recalled by December 19, 1980, whereas Ewing was not recalled until April 27, 1981, and then let go again a short while later. I do not credit the testimony of Vice President Shafer who denied that he said to Ewing over the phone or that he said to Ewing and Burke at their meeting that Respondent did not want Ewing as an employee because of the OSHA complaint. I credit the testimony of Ewing and Burke and find that Shafer stated over the phone to Ewing in March 1980 and in person to both Ewing and Burke in March 1980 that Ewing was not being recalled because Respondent believed that he made a complaint to OSHA. It was not until after OSHA stated in writing that the OSHA inspection of Respondent was not initiated as a result of any complaint that Ewing was first recalled to work on April 27, 1981. The shaby treatment of Ewing thereafter, i.e., being recalled for four brief periods of time and then not being recalled until after a 5-month layoff when other piledrivers were called up for work is attributed to Respondent's resentment toward Ewing, initially because he was suspected of having reported the Company to OSHA and, thereafter, because he complained about his treatment and sought legal counsel.

[2] The following piledrivers were put on the payroll by Respondent durinig the time that Ewing was free to be recalled but was not: J. Bohen, T Davison, R. Felshaw, Jr., T. Rogers, E. D. Skinner, W. Stone, Sr., R. Ast, Sr., G. McLane, K. Cannan, E. O'Donnell, Jr., J. Wojcik, T. Higgins, P. Hoffman, J. O'Donnell, T. Duffy, E. Flaherty, M. Leach, W. McCarthy, C. McLane, D. Virgilio, R. Skinner, R. Ast, Jr., D. M. Stacid, C. Grotke, P. O'Donnell, S. Bohen, P. Bohen, C. Dingeldey.

Legal Analysis

If an employee files a complaint with OSHA concerning safety conditions at his job this is protected concerted activity under Section 7 of the Act even if the employee is acting alone provided there is no evidence that fellow employees disavow what he is doing and the employee may not be disciplined or discriminated against by the employer for filing the complaint. *Alleluia Cushion Co.*, 221 NLRB 999 (1975); *J.P. Stevens & Co.*, 240 NLRB 579 (1979). The Board found merit in the argument that to discipline an employee who files a complaint "would indicate to the other employees the danger of seeking assistance from Federal or state agencies in order to obtain their statutorily guaranteed working conditions, and would thus frustrate the purposes of such protective legislation" 221 NLRB at 1000. That same rationale would apply if an employee were disciplined or discriminated against by an employer who mistakenly believed a complaint was filed by that employee. If it is violative of Federal labor law to discriminate against an employee who engages in protected concerted activity, *a fortiori*, it is violative to discriminate against an employee when the employer only believes the employee has engaged in protected concerted activity. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589–590 (1941), *Henning & Creadle*, 212 NLRB 776 (1974). I find that Respondent violated Section 8(a)(1) of the Act when it refused to recall Ewing after his layoff on December 3, 1980, until April 27, 1981, and, thereafter, violated the Act by recalling Ewing for short periods of time only and then laying him off from June 29, 1981, until December 1981, because of Respondent's mistaken belief that Ewing had filed a complaint concerning Respondent with OSHA.

IV. REMEDY

Since Ewing was reinstated by Respondent in December 1981, my recommended Order in this case will direct Respondent to cease and desist from engaging in conduct of a similar nature, to make Ewing whole for any loss of earnings he may have suffered, and to post an appropriate notice.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By failing to recall Robert T. Ewing, Respondent has engaged in n unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]